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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ANGELA GASPAR and DARRIN WILLARD, on behalf of Themselves and all others similarly situated, Plaintiffs, v. CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS, VERIZON COMMUNICATIONS, INC., VODAPHONE GROUP PLC and DOES 1-100, Defendants.	Case No. CV10-02139-DSF(SSx) **NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Date: July 12, 2010 Time: 1:30 p.m. Judge: Hon. Dale S. Fischer Courtroom: Roybal 840

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that on July 12, 2010 at 1:30 p.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable Dale S. Fischer, United States District Judge, Central District of California, located at 255 East Temple Street, Los Angeles, California 90012, Defendant Cellco Partnership dba Verizon Wireless ("Verizon Wireless") will move, and hereby does move for

an order compelling Plaintiffs Angela Gaspar and Darrin Willard to arbitrate their claims in this case pursuant to their customer agreements with Verizon Wireless, or in the alternative, to stay this action until the United States Supreme Court issues an opinion in *Concepcion v. AT&T Mobility LLC, cert. granted*, __ S. Ct. __, No. 09-893, 2010 WL 303962 (U.S. May 24, 2010).

This Motion is based on this Notice of Motion and Motion, Defendant's supporting Memorandum of Points and Authorities, the Declaration of Ana Diaz and exhibits thereto, and the court records and files in this Action.[1]

This motion is made following a conference of counsel pursuant to Local Rule 7-3 which took place on May 25, 2010.

Dated: June 4, 2010

DAN MARMALEFSKY
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By: /s/ Dan Marmalefsky
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[1] In an abundance of caution, Verizon Wireless is filing concurrently herewith a Motion to Dismiss Plaintiffs' Complaint. Verizon Wireless contends that this Motion to Compel Arbitration and to Stay Proceedings should be considered and ruled upon by the Court first and that the Motion to Dismiss should only be considered by the Court in the event this motion is denied. Verizon Wireless' precautionary filing of the Motion to Dismiss should not be construed as a waiver of its right to compel arbitration.

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I. INTRODUCTION

By this Motion, Defendant Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless") seeks to preserve its right to compel Plaintiffs Angela Gaspar and Darrin Willard to arbitrate their individual claims against Verizon Wireless pursuant to the terms of their Customer Agreements, which preclude class-wide arbitration.

Verizon Wireless acknowledges that the Ninth Circuit has found consumer arbitration agreements with class action waivers unconscionable under California law and has held that the Federal Arbitration Act ("FAA") does not preempt the application of California law to revoke such agreements. *Shroyer v. New Cingular Wireless Servs., Inc.* 498 F.3d 976 (9th Cir. 2007); *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009) ("*Concepcion*").[2] The United States Supreme Court, however, recently granted a petition for certiorari in *Concepcion* to decide whether the FAA preempts the application of California law that denies enforcement of agreements containing waivers of class-wide arbitration. Accordingly, Verizon Wireless presents its arguments here to preserve them pending the outcome of the Supreme Court's decision in *Concepcion*, which will determine whether federal law preempts application of California law that would otherwise bar enforcement of the parties' arbitration agreements in this case.

Verizon Wireless also seeks an order staying these proceedings until the Supreme Court resolves the *Concepcion* case. That is the same procedure followed by the court in *Concepcion* itself pending the appeal of its Order denying the motion to compel arbitration to the Ninth Circuit and pending the petition for

[2] The *Laster* case was consolidated with *Concepcion v. AT&T Mobility LLC*, Case No. 06 cv 675 DMS (NLS), the case in which the arbitration issue is being litigated. For the sake of clarity, this brief refers to that case as *Concepcion*, rather than *Laster*.

certiorari to the Supreme Court. Litigating this case while the Supreme Court reviews an issue that could be dispositive of Plaintiffs' right to proceed in this Court would result in a waste of time and resources both for the parties and the Court, and would irreparably harm Verizon Wireless in the event the Supreme Court reverses the Ninth Circuit's position in *Concepcion*. Plaintiffs will not be prejudiced by the stay because the stay will not impact their ability to litigate or arbitrate their individual claims in due course and obtain any recovery to which they might be entitled. Nor will Plaintiffs suffer any financial hardship in waiting for the Supreme Court's decision in *Concepcion* since the amount of their individual claims for restitution or damages are minimal.

II. BACKGROUND

Plaintiffs entered into contracts with Verizon Wireless for wireless voice and data communications services. (Complaint ("Compl.") ¶¶ 9, 22, 23.) Those contracts provided that customers will be billed for service in monthly increments. (Declaration of Ana Diaz ("Diaz Decl."), Exs. B at p. 2; D at p. 8; F at p. 2.) Those contracts further provided that any termination of service during a monthly billing cycle becomes effective on the last day of that billing cycle and that no partial-month credits or refunds will be provided. (*Id.*) Plaintiffs contend this "non-proration" policy violates the California Consumer Legal Remedies Act and California Business & Professions Code section 17200. (Compl.)

The Agreements that Plaintiffs signed in connection with their purchases of wireless service from Verizon Wireless provide, in pertinent part, as follows:

> I AGREE TO THE CURRENT VERIZON WIRELESS CUSTOMER AGREEMENT (CA), INCLUDING THE CALLING PLAN . . . AND OTHER TERMS AND CONDITIONS FOR SERVICES AND SELECTED FEATURES I HAVE AGREED TO PURCHASE AS REFLECTED ON THE RECEIPT AND WHICH HAVE BEEN PRESENTED TO ME BY THE SALES REP. AND WHICH I HAD THE OPPORTUNITY TO REVIEW. I UNDERSTAND THAT I AM AGREEING TO. . . SETTLEMENT OF DISPUTES BY ARBITRATION AND OTHER MEANS INSTEAD OF JURY TRIALS AND OTHER IMPORTANT TERMS IN THE CA.

(Diaz Decl., ¶¶ 4-6, Exs. A at pp. 2-3; C at p. 2; E at pp. 2-3.)

The Customer Agreement Terms & Conditions that Plaintiffs accepted when they signed the Agreements provide for arbitration as follows:

> **Dispute Resolution and Mandatory Arbitration**
>
> **WE EACH AGREE TO SETTLE DISPUTES . . . ONLY BY ARBITRATION. THERE'S NO JUDGE OR JURY IN ARBITRATION, AND REVIEW IS LIMITED, BUT AN ARBITRATOR CAN AWARD THE SAME DAMAGES AND RELIEF, AND MUST HONOR THE SAME LIMITATIONS IN THIS AGREEMENT, AS A COURT WOULD. IF AN APPLICABLE STATUTE PROVIDES FOR AN AWARD OF ATTORNEY'S FEES, AN ARBITRATOR CAN AWARD THEM TOO. WE ALSO EACH AGREE, TO THE FULLEST EXTENT PERMITTED BY LAW, THAT:**
>
> (1) THE FEDERAL ARBITRATION ACT APPLIES TO THIS AGREEMENT. EXCEPT FOR QUALIFYING SMALL CLAIMS COURT CASES, ANY CONTROVERSY OR CLAIM ARISING OUT OF OR RELATED TO THIS AGREEMENT. . .OR ANY PRODUCT OR SERVICE PROVIDED UNDER OR IN CONNECTION WITH THIS AGREEMENT. . . OR ANY ADVERTISING FOR SUCH PRODUCTS OR SERVICES WILL BE SETTLED BY ONE OR MORE NEUTRAL ARBITRATORS BEFORE THE AMERICAN ARBITRATION ASSOCIATION ("AAA") OR BETTER BUSINESS BUREAU ("BBB"). . . . .
>
> * * *
>
> (3) YOU CAN OBTAIN PROCEDURES, RULES AND FEE INFORMATION FROM THE AAA (WWW.ADR.ORG), THE BBB (WWW.BBB.ORG), OR FROM US. **THIS AGREEMENT DOESN'T PERMIT CLASS ARBITRATIONS EVEN IF THOSE PROCEDURES OR RULES WOULD.**

* * *

(6) IF FOR SOME REASON, THE PROHIBITION ON CLASS ARBITRATIONS SET FORTH IN SUBSECTION (3) ABOVE IS DEEMED UNENFORCEABLE, THEN THE AGREEMENT TO ARBITRATE WILL NOT APPLY. FURTHER, IF FOR ANY REASON A CLAIM PROCEEDS IN COURT RATHER THAN THROUGH ARBITRATION, WE EACH WAIVE ANY TRIAL BY JURY.

(Diaz Decl., ¶¶ 4-6, Exs. B at pp. 7-9; D at p. 12; F at pp 8-10 (bold font in originals).)

III. LEGAL ARGUMENT

A. Plaintiffs' Claims Fall Within The Scope Of The Parties' Arbitration Agreements

A motion to compel arbitration requires this Court to determine (1) whether there is a valid agreement to arbitrate and (2) if the dispute falls within the scope of the arbitration agreement. *Chiron Corp. v. Ortho Diagnostic Sys., Inc.,* 207 F.3d 1126, 1130 (9th Cir. 2000). Under federal law, courts are required to "rigorously enforce agreements to arbitrate," *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 221 (1985), and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24-25 (1983).

In this case, the dispute falls within the scope of the parties' broad arbitration agreements, which encompass "any controversy or claim arising out of or related to this agreement . . . or any product or service provided under or in connection with this agreement. . . ." (Diaz Decl., ¶¶ 4-6, Exs. B at p. 8; D at p. 12; F at p. 8.) This is a dispute about the enforceability of the non-proration provision contained in the Customer Agreements that Plaintiffs each entered into with Verizon Wireless. Plaintiffs contend that the non-proration provision is unenforceable, unconscionable and prohibited by California law. They seek restitution for a portion of the amounts they paid or may later be contractually obligated to pay to Verizon Wireless as well as an injunction prohibiting Verizon

Wireless from enforcing the non-proration policy against them in the future. As this dispute relates directly to the terms of the Customer Agreement, it falls squarely within the scope of the parties' agreements to arbitrate.

B. This Court Is Bound By The Ninth Circuit's Determination That Class Action Waivers In Consumer Contracts Of Adhesion Are Unconscionable Under California Law

The FAA creates "a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24. Whether or not there is a valid arbitration agreement is determined by reference to Section 2 of the FAA, which provides that an arbitration agreement in "a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract." 9 U.S.C. § 2. "[G]enerally applicable contract defenses," such as unconscionability, "may render an arbitration provision unenforceable." *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1267-68 (9th Cir. 2006).

Verizon Wireless contends that its arbitration agreements with Plaintiffs are valid and enforceable, and that they are not unconscionable, notwithstanding the waiver of class-wide arbitration. The agreements provide, *inter alia*, that Verizon Wireless agrees to pay the filing, administrative and arbitrator fees if mediation is unsuccessful. Thus, there is no "oppression or surprise due to unequal bargaining power" or an "overly harsh or one-sided result." *Discover Bank v. Super. Ct. of Los Angeles,* 36 Cal. 4th 148, 160 (2005).

Verizon Wireless acknowledges that its arguments have been rejected by the Ninth Circuit, which has held that other, similar wireless service agreements are unconscionable under California law. *Shroyer*, 498 F.3d at 976; *Concepcion*, 584 F.3d at 849. In *Shroyer,* the Ninth Circuit recognized that under California law "a contract provision is unenforceable due to unconscionability only if it is both procedurally and substantively unconscionable." 498 F.3d at 981. An arbitration

agreement is unconscionable under California law "when the [class action] waiver is [(i)] found in a consumer contract of adhesion [(ii)] in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and [(iii)] when it is alleged that the party with superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." *Id.* at 983, quoting *Discover Bank*, 36 Cal. 4th at 162. The Ninth Circuit adopted that test set forth by the California Supreme Court in *Discover Bank* to determine that a class action waiver in the parties' arbitration agreement in a contract for cellular services was "both procedurally and substantively unconscionable and, therefore, unenforceable." 498 F.3d at 981.

More recently, in *Concepcion*, the Ninth Circuit followed *Shroyer* to find an arbitration provision that contained a class action waiver unconscionable and unenforceable under California law. The contract at issue in *Concepcion* was for the purchase of a bundled cell phone from Cingular Wireless (now known as AT&T Mobility), and the plaintiff claimed that AT&T's practice of charging sales tax on cell phones advertised as "free" was fraudulent. *Id.* at 853. The Ninth Circuit, relying on *Shroyer* and the California Supreme Court's decision in *Discover Bank*, affirmed the district court's denial of AT&T's motion to compel arbitration. *Id.* at 853-55.

Based upon existing Ninth Circuit precedent, Verizon Wireless agrees that the parties' arbitration agreement in this case likely would be deemed unconscionable under California law. The United States Supreme Court is, however, currently reviewing whether the FAA preempts state law on this issue.

C. The United States Supreme Court Recently Granted A Petition For Certiorari To Determine Whether The FAA Preempts The Application Of California's Law Of Unconscionability To Invalidate Class-Wide Waivers In Arbitration Agreements

Section 2 of the FAA provides that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity

for the *revocation* of any contract." 9 U.S.C. § 2 (emphasis added). In *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987), the Supreme Court held that a "state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2" and therefore a court cannot "rely on the uniqueness of an [arbitration] agreement as a basis for a state-law holding that enforcement would be unconscionable . . . ." Verizon Wireless contends that application of California's unconscionability law to invalidate the parties' arbitration agreement because it contains a waiver of class-wide arbitration would run afoul of these principles. The Ninth Circuit, however, disagreed in *Shroyer* and *Concepcion.*

In *Shroyer,* the Ninth Circuit held that the FAA "does not bar federal or state courts from applying generally applicable state contract law principles and refusing to enforce an unconscionable class action waiver in an arbitration clause." 498 F.3d at 987. The court rejected defendant's "express preemption argument" and re-affirmed its prior decisions that unconscionability was a "generally applicable contract defense [that] may be applied to invalidate an arbitration agreement without contravening § 2 of the FAA." *Id.* at 988 (quoting *Ting v. A.T.&T.*, 319 F.3d 1126, 1150 n.15 (9th Cir. 2003)). Accordingly, the Court held that California law is "not impliedly preempted" by the FAA. 498 F.3d at 993.

The Ninth Circuit followed *Shroyer's* preemption holding in *Concepcion*. *Concepcion*, 584 F.3d at 857 ("*Shroyer* controls this case because [AT&T] makes the same [preemption] arguments we rejected there."). On May 24, 2010, however, the United States Supreme Court granted a petition for certiorari in the *Concepcion* case. *See* _ S.Ct. _, 2010 WL 303962 (U.S. May 24, 2010). The issue presented to the Court was whether:

> the FAA preempts States from conditioning the enforcement of an arbitration agreement on the availability of particular procedures —here, class-wide

> arbitration — when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims.

2010 WL 304265 (Petition for a Writ of Certiorari, filed Jan. 25, 2010.)

If the Supreme Court reverses the Ninth Circuit's ruling in *Concepcion* and holds that the FAA preempts the application of California law to bar enforcement of arbitration agreements with class action waivers, the arbitration provisions entered into by Plaintiffs and Verizon Wireless in this case would be enforceable under the FAA. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) ("[T]he very purpose of the Act was to 'ensur[e] that private agreements to arbitrate are enforced according to their terms'") (internal citation omitted); *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1774-76 (2010) (noting that "parties are generally free to structure their arbitration agreements as they see fit" and that the "changes brought about by the shift from bilateral arbitration to class-action arbitration", such as a loss of cost savings, are "fundamental") (internal quotation marks omitted.) In particular, because Plaintiffs' arbitration agreements are "written" and in contracts "evidencing a transaction involving commerce," they are enforceable absent "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. No such grounds exist here.

We recognize that this Court is bound by current Ninth Circuit precedent holding the application of California's unconscionability defense to invalidate class action arbitration waivers does not violate section 2 of the FAA. Accordingly, Verizon Wireless's argument is presented for the purposes of preserving it until the Supreme Court resolves this issue in the *Concepcion*.

D. The Court Should Stay This Action Pending The United States Supreme Court's Decision In *Concepcion*

This Court should exercise its power to stay this action pending the Supreme Court's decision in *Concepcion*. The Supreme Court long ago established that "the

power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 817 (9th Cir. 2003) ("[d]istrict courts have inherent authority to stay proceedings before them"). In considering whether to grant a stay, this Court must weigh several interests: (1) the possible damage that may result from the granting of a stay, (2) the hardship or inequity which a party may suffer in being required to go forward, and (3) the orderly course of justice "measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962).

Each of these factors weighs in favor of granting a stay here. *First*, Plaintiffs would not be prejudiced by the stay, because they can continue to pursue their claims either in this Court if the Supreme Court affirms the Ninth Circuit, or in arbitration if *Concepcion* is reversed. Plaintiffs' individual claims are based entirely upon the written terms of the Customer Agreements they entered into, thus there is no chance that delay will result in a loss of evidence. Further, a delay pending the Supreme Court's decision in *Concepcion* will not have any significant impact on Plaintiffs themselves since the amount of their individual claims are each necessarily less than the cost of one month of wireless service fees.

Second, Verizon Wireless would be irreparably harmed by being required to proceed with litigating in this Court should the Supreme Court reverse the Ninth Circuit in *Concepcion*. Verizon Wireless entered into the arbitration agreements with Plaintiffs in order to avoid the significant expense and burden of litigation, and it will be permanently denied the benefit of its agreements in the event this Court requires the parties to proceed with litigation and the Supreme Court reverses *Concepcion*. Proceeding with litigation would also impose potentially unnecessary burdens on the Court, which would have to rule on Verizon Wireless' motion to

dismiss, class certification, discovery, and other motions that would be unnecessary if *Concepcion* is reversed.

Third, this action may become moot if the Supreme Court reverses the Ninth Circuit in *Concepcion* and Plaintiffs are compelled to arbitrate, rather than litigate, their claims.

It is common for district courts to stay proceedings when there is a reasonable possibility that the Supreme Court could eliminate the need for such proceedings by granting review and reversing the order below. *See, e.g., NGV Gaming, Ltd. v. Harrah's Operating Co.*, No. 04-3955 SC, 2008 WL 4951587, at *1 (N.D. Cal. Nov. 18, 2008); *Minor v. Fedex*, No. C09-1376 THE, 2009 WL 1955816 (N.D. Cal. July 6, 2009) (granting stay of proceedings in light of California Supreme Court's grant of review of another case); *Ortega v. J.B. Hunt Transp., Inc.*, 258 F.R.D. 361, 371 (C.D. Cal. 2009) (finding stay appropriate in light of cases pending before the California Supreme Court that could "have a significant impact on the course of this litigation"); *Davison v. Hart Broadway, LLC*, No. CIV S-07-1894 LKK/CMK, 2009 WL 1813979 (E.D. Cal. June 23, 2009). The same reasoning that justifies those stays also supports an order staying this case pending the resolution of *Concepcion*.

IV. CONCLUSION

For the reasons stated above, Verizon Wireless brings this motion to preserve its right to compel Plaintiffs to arbitrate their individual claims pending the outcome of the United States Supreme Court decision in *Concepcion*. Until *Concepcion* is decided, this Court should stay these proceedings to avoid the

expenditure of time and resources involved in litigating this case and the irreparable harm that Verizon Wireless would suffer if the Ninth Circuit is reversed by the Supreme Court in that case.

Dated: June 4, 2010

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